15

No. 04-473

Supreme Court, U.S.
FILED
JUL 22 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GIL GARCETTI, *et al.*,

Petitioners,

v.

RICHARD CEBALLOS,

Respondent.

On Writ Of *Certiorari* To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* GOVERNMENT ACCOUNTABILITY PROJECT, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF RESPONDENT

JOANNE ROYCE*
THOMAS M. DEVINE
GOVERNMENT ACCOUNTABILITY PROJECT
1612 K Street, NW,
Suite 1100
Washington, D.C. 20006
(202) 408-0034

**Counsel of Record for the Amici Curiae*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI* CURIAE	1
SUMMARY OF THE ARGUMENT	4
ARGUMENT	6
I. First amendment coverage for job-required speech is a necessity for the government to function effectively.	8
A. Constitutional protection of speech expressed pursuant to employment duties is essential for the First Amendment's paramount objectives	8
B. Canceling protection for job-required speech would impair government efficiency, because clear channels of communication are a prerequisite for the government to function effectively	12
C. Per se exclusion of First Amendment coverage for job-required speech is unworkable	16
II. Constitutional protection for job-required speech is consistent with past Supreme Court precedent	17
III. State and federal statutes are an inherently inadequate substitute for constitutional protection	20
IV. Petitioner's warnings of paralyzed management and flooded courts has failed the reality test	22

TABLE OF CONTENTS – Continued

Page

A. Careful application of "public concern" jurisprudence and *Pickering* balance will check frivolous First Amendment claims 22

B. Decades of environmental whistleblower jurisprudence protecting disclosures pursuant to job duties have not resulted in flood of litigation 24

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Brady v. Maryland, 373 U.S. 83 (1963) 6, 7, 16

Bridges v. California, 314 U.S. 252 (1941) 5, 18

Brown and Root v. Donovan, 747 F.2d 1029 (5th Cir. 1984) 26

Burkett v. U.S., 402 F.2d 1002 (Ct. Cl. 1968) 19

Connick v. Myers, 461 U.S. 138 (1983) 5, 10, 17, 18, 24

City of Madison Jt. School District No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) 19

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979) 5, 19

Horton v. Dept. of Navy, 66 F.3d 279 (Fed. Cir. 1995) 22

Hostrop v. Bd. of Junior College Dist. No. 515, 471 F.2d 488 (7th Cir. 1972) 19

Huffman v. OPM, 263 F.3d 1341 (Fed. Cir. 2001) 22

Kansas Gas & Electric Company v. Brock, 780 F.2d 1505 (10th Cir. 1985) 26

Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (9th Cir. 1984) 24, 25, 26

Meuwissen v. Department of Interior, 234 F.3d 9 (Fed. Cir. 2000) 22

Mills v. Alabama, 384 U.S. 214 (1966) 9

Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274 (1977) 24

N.L.R.B. v. Scrivener, 405 U.S. 117 (1972) 5, 18

TABLE OF AUTHORITIES – Continued

Page

Pickering v. Board of Education, 391 U.S. 563 (1968) ..... *passim*

U.S. v. National Treasury Employees' Union, 513 U.S. 454 (1995) 23

Waters v. Churchill, 511 U.S. 661 (1994) 1, 11, 18

Waters v. Peterson, 495 F.2d 91 (D.C. Cir. 1973) 15

Whitney v. California, 274 U.S. 357 (1927) 8

Willis v. Department of Agriculture, 141 F.3d 1139 (Fed. Cir. 1998) 22

CONSTITUTION

U.S. Const. amend. I ..... *passim*

STATUTES

5 U.S.C. § 2302(b)(8) 4

18 U.S.C. § 1514A 2

Clean Air Act, 42 U.S.C. § 7622 (2005) 24

D.C. Code § 1-615.58(7) (2005) 7

Energy Reorganization Act, 42 U.S.C. § 5851 (2005) 24

Federal Water Pollution Control Act, 33 U.S.C. § 1367 (2005) 24

Miss. Code Ann. § 43-47-37 (1999 & Supp. 2003) 20

Safe Drinking Water Act, 42 U.S.C. § 300-j-9 (2005) 24

Solid Waste Disposal Act, 42 U.S.C. § 6971 24

Superfund, 42 U.S.C. § 9610 (2005) 24

TABLE OF AUTHORITIES – Continued

Page

Texas Govt. Code Ann. § 554.001-.10 (Vernon 1994 & Supp. 2004) 20

Toxic Substances Control Act, 15 U.S.C. § 2622 (2005) 24

Utah Protection of Public Employees Act, Utah Code Ann. § 67-27-1 to -9 (2000) 20

W. Va. Code Ann. § 6C-1-1 to -8 (Michie 2003) 20

Whistleblower Protection Act of 1989, P.L. No. 101-12, 103 Stat. 16 (1989) 2

Wis. Stat. Ann. § 895.65 (West 1997 & Supp. 2003) 21

Wyo. Stat. § 9-11-103 (Michie 2003) 21

LEGISLATIVE DOCUMENTS

134 Cong. Rec. S10632 (daily ed., Aug. 2, 1988) 21

134 Cong. Rec. H9323 (daily ed., Aug. 2, 1988) 21

134 Cong. Rec. S15337 (daily ed., Aug. 2, 1988) 21

135 Cong. Rec. S10632 (daily ed., March 16, 1989) 21

135 Cong. Rec. S2805 (daily ed., Aug. 2, 1988) 21

Hearing on S. 1358 Before the Senate Governmental Affairs Committee (Nov. 12, 2003) (testimony of Thomas M. Devine), slip at 25 21

S. Rep. No. 95-969 (1978) 11

S. Rep. No. 107-349 (2002) 21

Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. 2635.101(b)(11) 7

TABLE OF AUTHORITIES – Continued

Page

The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse and Corruption Prepared for the Senate Comm. On Governmental Affairs, 95th Cong., 2d Sess. 49 (1978) 13, 14

OTHER AUTHORITIES

Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers and the Implications of the Sarbanes-Oxley Act for Employment Law,* 79 Wash. L. Rev. 1029 (2004) 20

Report of the National Commission on Terrorist Attacks, 399-428 Government Printing Office (2004) 14

Stephen M. Kohn, *Concepts and Procedures in Whistleblower Law* 383 (2001) 14, 20

Thomas M. Devine, *The Whistleblower's Survival Guide: Courage Without Martyrdom* (1997) 2

Thomas M. Devine, *The Whistleblower Protection Act and the Modern Law of Dissent,* 51 Administrative Law Review 531 (Spring 1999) 21

Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent,* 51 Admin. L.R. 531 (1999) 2

Thomas M. Devine *et al., Whistleblowing Around the World: Law, Culture and Practice,* "Whistleblowing and the United States: The gap between vision and lessons learned" (2004) 2

Thomas I. Emerson, *The System of Freedom of Expression* 566 (1970) 10

TABLE OF AUTHORITIES – Continued

Page

Memorandum of President George W. Bush to Heads of Executive Departments and Agencies on Standards of Official Conduct (Jan. 20, 2001) 7

Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Executive Branch,* 1982 U. Ill. L. R. 615 21

Robert G. Vaughn, Thomas M. Devine & Keith Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistelblowers,* 35 Geo. Wash. Int'l L. Rev. 857 (2003) 2

INTEREST OF THE *AMICI CURIAE*[1]

Amici are organizations each with a long history of occupational free speech advocacy. *Amici* are dedicated to the concept that "a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters." *Waters v. Churchill*, 511 U.S. 661, 674 (1994).

The Government Accountability Project (GAP) is a non-partisan, non-profit public interest law firm specializing in legal advocacy on behalf of "whistleblowers" – government and corporate employees who expose illegality, gross waste and mismanagement; abuse of authority; substantial or specific public health and safety dangers; or other institutional misconduct undermining the public interest.

GAP's efforts on behalf of federal whistleblowers, in particular, are based on the belief that a professional and dedicated civil service is essential to an effective democracy. Civil servants are the vital link between our government and the people it serves. They are the foundation to keep responsible government service a constant, regardless of variations in leadership or political party. GAP believes that to preserve not only the integrity and independence of the federal civil service, but also the responsiveness of federal institutions to the citizenry, conscientious employees who point out illegal or questionable practices

---

[1] This brief is filed with consent of both parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and its members and counsel made any monetary contribution to the preparation or submission of this brief.

must not be forced to choose between their jobs and their silence.

GAP has substantial expertise on protecting government employees' free speech rights. GAP attorneys have testified before Congress over the last two decades concerning the effectiveness of existing statutory protection, filed numerous *amicus curiae* briefs on constitutional and statutory issues relevant to whistleblowers, co-authored the model whistleblower protection law to implement the Inter-American Convention Against Corruption, and led legislative campaigns for a broad range of relevant federal laws, including the Whistleblower Protection Act of 1989, P.L. No. 101-12, 103 Stat. 16 (April 10, 1989) (WPA) and subsequent 1994 amendments, as well as the employee rights provisions in the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A. GAP has published material concerning the WPA and its practical realities. *See, e.g.*, Thomas M. Devine, *The Whistleblower's Survival Guide: Courage Without Martyrdom* (1997); Thomas M. Devine *et al.*, *Whistleblowing Around the World: Law, Culture and Practice*, "Whistleblowing and the United States: The gap between vision and lessons learned" (2004); Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 Admin. L.R. 531 (1999); and Robert G. Vaughn, Thomas M. Devine & Keith Henderson, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, 35 The Geo. Wash. Int'l L. Rev. 857 (2003).

The National Employment Lawyers Association (NELA) is the only professional membership organization in the country comprised of lawyers who represent employees in labor, employment and civil rights disputes. NELA and its 67 state and local affiliates have a membership of

over 3,000 attorneys who are committed to working on behalf of those who have been illegally treated in the workplace. NELA strives to protect the rights of its members' clients, and regularly supports precedent-setting litigation affecting the rights of individuals in the workplace. NELA advocates for employee rights and workplace fairness while promoting the highest standards of professionalism, ethics and judicial integrity.

The Association of Trial Lawyers of America (ATLA) is a voluntary national bar association of approximately 50,000 members practicing in every State. ATLA members primarily represent plaintiffs in personal injury, civil rights and employment discrimination cases. ATLA has long advocated legal protections for employees who step forward to expose wrongful or dangerous misconduct.

Amici agree that the contribution of whistleblowers to uncovering and rectifying grave problems facing society at large cannot be overstated. Whistleblowers are employees who take an ethical stand against wrongdoing. They often do so at great risk to their careers, financial stability, and personal and familial relationships. Frequently, whistleblowers are courageous people of integrity who have observed and documented fraud, gross violations of law or health-threatening safety and environmental hazards. *Amici* advocate that society protect and applaud whistleblowers, because they are saving lives, preserving our health and safety and preserving vital fiscal resources. *Amici* respectfully submit this brief to assist the Court in resolution of this case.

SUMMARY OF THE ARGUMENT

The case at bar will establish whether there is constitutional protection for public employees whose responsibilities require them to assume the risks of whistleblowers, often involuntarily, in order to carry out the duties of their positions. Petitioners would have the Court create a Catch-22, where a public servant must choose between legally abdicating his or her duty, or else being legally defenseless against harassment such as professional isolation or termination – the likely consequences if job-required speech is controversial or threatens politically powerful interests within or outside the government.

Protection for job-required speech is a prerequisite for the government to function effectively. It is deeply-ingrained that freedom of expression includes activities within the employment relationship, and job-required speech is where the First Amendment counts the most for the public dependent on the government to function responsibly. Government employees are the indispensable early warning system to catch problems before government service deteriorates, whether the consequences would be waste of taxpayer funds or unnecessary public health and safety threats. In the context of dissent, their role has been popularized as "whistleblowers." Under 5 U.S.C. § 2302(b)(8) for the federal civil service they are defined as employees who disclose information they reasonably believe is evidence of illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety. The stakes are even higher for those engaging in job-required speech not necessarily including dissent, but often requiring a

messenger to deliver unwelcome news or carry out unpopular assignments.

Normally, a First Amendment case requires the Court to balance the employee's rights as a citizen against the government's right to efficiently manage its institutions. Petitioners ask the Court to withdraw constitutional rights in a radically different, lose-lose scenario for both principles. If employees cannot defend themselves for communicating openly and honestly about politically unpopular assignments, the inevitable chilling effect would create a code of silence that replaces the free flow of information necessary for government managers to make informed, responsible judgments and oversee their implementation. The government cannot function efficiently in a structure that encourages public employees to be silent observers and that shields managers who "don't want to know." Ironically, canceling constitutional protection for mandatory intra-agency communications not only would dry up the flow of information internally but would exacerbate and maximize unnecessary public controversy, because that would be the only remaining safe context left for a public employee.

Petitioners ask the Court to overturn a longstanding doctrine highlighted by the *Bridges, Pickering, Givhan, Scrivener* and *Connick* decisions that shield speech necessary for public service. Contrary to Petitioner's sophistic distinction, the key factor behind this doctrine has been the subject matter and value of constitutionally-protected speech, not the identity or societal role of the speaker. Petitioner's dire warnings of paralyzed management and flooded courts already have failed the reality test. As demonstrated by the *Pickering* doctrine's history, the Court's case-by-case balancing test has developed adequate criteria for a

functional free speech boundary. Further, neither management nor the courts have been overburdened by the experience under environmental whistleblower statutes, where for decades corporate workers have had the right that Petitioners find so threatening.

There is, likewise, no basis to conclude constitutional protection is unnecessary due to the existence of federal, state and local whistleblower statutes. Their hit or miss coverage and drastically different track records of effectiveness have been characterized by inconsistent boundaries for protection with respect to the type of disclosure, subject matter, manner of disclosure and remedies. The federal whistleblower law excludes protection for speech to carry out assignments. Clearly, sporadic statutory coverage is no substitute for a minimum foundation of constitutional rights.

ARGUMENT

The case at bar crystallizes the quandary of the federal employee who, as part of his or her job duties, identifies governmental waste, fraud or illegality and suffers retaliation at the hands of a governmental authority for his duty to report. Here, Richard Ceballos, a deputy district attorney, reported in a disposition memorandum to his supervisors that an affidavit in support of a search warrant had been falsified. Pursuant to the dictates of *Brady v. Maryland*, 373 U.S. 83 (1963), he also shared his determination with defense counsel in the underlying case. Subsequently he suffered retaliation as confirmed below for his disclosures within the chain of command and those made to defense counsel as required by law.

The dilemma faced by Respondent Ceballos – of having a duty to report wrongdoing, but having no commensurate protection from retaliation – is neither theoretical nor infrequent. Indeed, the duty to disclose is an increasingly common reality for government employees. To illustrate, every federal employee who witnesses fraud, waste or illegality is faced with the same predicament. The Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, § 2635.101(b)(11) provides as follows: "Employees shall disclose waste, fraud, abuse and corruption to appropriate authorities." On January 20, 2001, President Bush reiterated this obligation in a memorandum he issued to assure "the highest standards of integrity in Government." Memorandum from President George W. Bush to the Heads of Executive Departments and Agencies on Standards of Official Conduct (Jan. 20, 2001). Many state employees are similarly obligated as a part of their employment to report official malfeasance. *See, e.g.*, D.C. Code § 1-615.58(7) (2005) ("Each employee of the District government shall make all protected disclosures concerning any violation of law, rule, or regulation, contract, misuse of government resources or other disclosure enumerated in § 1-615.52(a)(6), as soon as the employee becomes aware of the violation or misuse of resources.").

To assert, as do Petitioners, that a federal employee may be constitutionally required to communicate certain *Brady* information but denied constitutional protection if that and associated disclosures within the chain of command engenders retaliation, well illustrates both the injustice and the illogic of denying First Amendment protection to speech expressed pursuant to job duties. It creates a Catch-22, where a public servant must choose

between illegally abdicating his or her duty and being legally defenseless against professional isolation or termination – the likely consequence if duty speech is controversial or threatens politically powerful interests within or outside the government.

I. FIRST AMENDMENT COVERAGE FOR JOB-REQUIRED SPEECH IS A NECESSITY FOR THE GOVERNMENT TO FUNCTION EFFECTIVELY.

A. Constitutional Protection of Speech Expressed Pursuant to Employment Duties is Essential for the First Amendment's Paramount Objectives.

One of the most eloquent formulations of First Amendment values was delivered by Justice Brandeis, in his concurring opinion in *Whitney v. California*, 274 U.S. 357 (1927):

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney, 274 U.S. at 375-76.

This Court has also established that unfettered speech concerning the manner in which government performs its

duties is a requisite element of the informed self-governance that the First Amendment seeks to protect:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Mills v. Alabama, 384 U.S. 214, 218-219 (1966).

It is well-established that freedom of expression includes speech in order to responsibly carry out job duties. As one commentator observed,

> The term ["expression" protected by the First Amendment] would also include communications made in the regular course of agency business, even a conversation between two employees of the agency on some minor matter pending for agency consideration. In other words, if the communication satisfies the other requirements for classification as "expression," the fact that it takes place within the employment relation does not take it out of the category of "expression." Any other view would, of course, render the First Amendment inapplicable except as to utterances made outside the course of agency business. But there is no reason to draw the line at such a point. Effective functioning of a system of freedom of expression requires, certainly so far as the government employee is concerned, protection made for statements made within the employment relation as well as outside it.

Thomas I. Emerson, *The System of Freedom of Expression* 566, 570-71 (1970).

In *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), this Court established the tests for application of that principle in a landmark decision that remains controlling: "the interests of the [employee] as a citizen, in commenting on matters of public concern" must be balanced against "the interest of the State as an employer, in promoting the efficiency of the public services it performs through its employees."

Beginning with *Pickering*, this Court recognized that the First Amendment should function as a bulwark against governmental tyranny for public employees as for any other citizen. "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick v. Myers*, 461 U.S. 138, 147 (1983). For public employees, no less than any other citizen, may be subjected to abusive governmental attempts to silence discourse on matters of public concern. Indeed, First Amendment protection of public employee complaints is compelled by the uniquely vulnerable status of the civil servant as "whistleblower." "[I]t is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574.

The *Pickering* doctrine recognizes not only the special vulnerability of the public employee but also the societal benefits of protecting employment-related speech. "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions. And a government employee, like any citizen, may have a strong,

legitimate interest in speaking out on public matters." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (citations omitted).

Since 1978, Congress has observed how whistleblowers ensure the values underlying the First Amendment:

> Often, the whistleblower's reward for dedication to the highest moral principles is harassment and abuse. Whistleblowers frequently encounter severe damage to their careers and substantial economic loss. Protecting employees who disclose government illegality, waste, and corruption is a major step toward a more effective civil service. In the vast federal bureaucracy it is not difficult to conceal wrongdoing provided that no one summons the courage to disclose the truth. Whenever misdeeds take place in a federal agency, there are employees who know that it has occurred, and who are outraged by it. What is needed is a means to assure them that they will not suffer if they help uncover and correct administrative abuses. What is needed is a means to protect the Pentagon employee who discloses billions of dollars in cost overruns, the GSA employee who discloses widespread fraud, and the nuclear engineer who questions the safety of certain nuclear plants.

S. Rep. No. 95-969, at 8 (1978).

The most trenchant weapon against governmental abuse of authority is the whistleblowing employee whose speech identifies waste, illegality or corruption in governmental operations. Job-related speech by government employees is critical to maintaining the promise of the First Amendment. It is speech where it counts. And if that speech happens to be part of an employee's job duties, the

interests protected by the First Amendment are of even greater significance for the public who is dependent upon responsible government function.

This case will establish whether there is constitutional protection for government employees whose responsibilities require them to be, often involuntary, whistleblowers, in order to carry out their duties to the public. If, as this Court has held, a government employee who engages in discretionary speech on matters of public concern is vulnerable and deserving of constitutional protection, the public employee whose duty it is to speak on such matters is even more vulnerable. Likewise, if public employees are uniquely informed due to their government employment, the public employee's unique expertise peaks for speech that is a part of job duties. Finally, an employee suffering retaliation for speech pursuant to job duties has at least as legitimate an interest in speaking on public matters as does any other citizen.

B. Canceling Protection for Job-Required Speech Would Impair Government Efficiency, Because Clear Channels of Communication are a Prerequisite for the Government to Function Effectively.

Normally in assessing a First Amendment case, the court must decide which valid but conflicting interest will lose, balancing between an employee's rights and the government's interest in efficiency. Petitioners ask this court to withdraw constitutional rights in a radically different, lose-lose scenario for *both* employee rights and the government's management interest in efficiency. As

recognized above, rights for whistleblowing are a major step toward a more effective civil service.

Duty speech is far more significant. The government cannot function effectively under a code of silence. In 1978, a massive Senate Governmental Affairs Committee study, concluded, "The code of silence thwarts management's ability to effectively manage and actually removes the burden of accountability from their shoulders. Fear of reprisal renders intra-agency communications a sham, and compromises not only the employee, but also the Constitutional function of congressional oversight itself." *The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse and Corruption Prepared for the Senate Comm. On Governmental Affairs*, 95th Cong., 2d Sess. 49 (1978).

In other words, it undermines government efficiency to have a structure that encourages a staff of "yes people" and that shields managers who "don't want to know." As the same Senate study also found,

> Agency heads who are not aware of potentially serious situations within their own organization obviously cannot take any measures to correct them. However, once informed of a problem, once provided with the existing facts pertaining to an allegation of wrongdoing, the agency head can decide what the appropriate response should be. He or she can, using existing authority, make decisions, resolve the problem and be held accountable for their actions. It is currently too easy for a serious problem to be excused within the bureaucracy because the "right" persons were not aware that it existed. . . .

> Agency policy makers must be made aware of and accountable for those problems that federal employees encounter in the course of their work. Safe, effective intra-agency communication is the prerequisite of responsible, efficient public service. Dissenting opinions and important information, however unpleasant, must be transmitted to government officials.

Id. at 3, 48.

In a chilling illustration of this principle, a major finding of the 9/11 Commission was that the breakdown in official communications increased America's vulnerability to terrorism. Report of the National Commission on Terrorist Attacks, 399-428 Government Printing Office (2004).

The principle is so fundamental that some statutes make it a prerequisite that an employee disclose misconduct allegations within the chain of command as a precondition for free speech rights outside the organization. Stephen M. Kohn, *Concepts and Procedures in Whistleblower Law* 383 (2001).

Canceling constitutional protection for duty speech would exacerbate the code of silence. There can be little uncertainty that when employees cannot defend themselves against retaliation, they are more likely to remain "silent observers" of misconduct they uncover in carrying out their job duties. Profiles in courage are the exception, not the rule. As this Court observed in *Pickering*, 391 U.S. at 574, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." In whatever context, public employees who criticize misconduct within their agencies are criticizing their employers. That creates

inherent discomfort. *Waters v. Peterson*, 495 F.2d 91, 98 (D.C. Cir. 1973). Employees throughout the government's public service mission logically could fear dismissal, demotion, retaliation or suspension in retaliation for speech necessary to perform their jobs properly – unless this Court recognizes First Amendment protection for duty speech, as well as for public debate.

The consequences are even more severe, however, for silencing duty speech compared to silencing dissent. Illegal government abdication can be even more threatening to public service than efficiency concerns. To illustrate, had Respondent Ceballos not made disclosures to his superiors and defendant's counsel, the integrity of the judicial system for that prosecution could have been fatally compromised. Coerced silence could thwart the public's right to know information essential for democratic legitimacy in government actions. The consequences could be disastrous for silencing mandatory reports of dangerous products such as contaminated meat and poultry, environmental spills, nuclear safety violations or defective military equipment. Taxpayers could be defrauded billions of dollars, if government auditors are silenced from performing their duties.

Ironically, while canceling constitutional protection for duty speech would increase internal silence, in some instances it could also increase public debate. Lack of safe, routine in-house channels would force government workers to make the same statements in extracurricular contexts in order to retain constitutional rights. Lack of safe internal channels will drive employees into public disclosures that create management inefficiency due to unnecessary, broad-based public conflicts. Forcing employees to take otherwise "job-required speech" out of the chain

of command in order to assure First Amendment protection would institutionalize the maximum disruptive effect for agencies. Managers would be far more likely not to receive notice of potential problems, allowing them to clean house before media and public exposure.

C. Per Se Exclusion of First Amendment Coverage for Job-Required Speech is Unworkable.

The facts of the case at bar further demonstrate why no per se rule should be established. Respondent Ceballos alleges that his speech involved more than strictly job duties – in addition to submitting his concerns about the falsified affidavit in the single disposition memorandum to his two supervisors and submitting *Brady* material to defense counsel, he also expressed his concerns to his colleagues in the District Attorney's office, to his supervisors (both orally and in writing), to the Deputy Sheriff who authored the affidavit, in a meeting with his supervisors and several representatives of the Sheriff's Department, and in a court hearing. Often, as here, an employee's speech may not be expressed strictly pursuant to his job duties or it may also contain speech completely unrelated to his job duties. In such cases, it is not practical or even possible to delineate which speech may have engendered retaliation. Consequently, this Court's observation in *Pickering* is as compelling today as it was then:

> Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.

Pickering, 391 U.S. at 569.

II. CONSTITUTIONAL PROTECTION FOR JOB-REQUIRED SPEECH IS CONSISTENT WITH PAST SUPREME COURT PRECEDENT.

By quoting selective passages of this Court's precedent out of context, Petitioners posit that the availability of First Amendment protection turns upon whether the employee speaks "as a citizen." Petitioners argue that when an employee speaks pursuant to the responsibilities of public employment, he speaks, by definition, "as an employee," not "as a citizen" and is not therefore covered by the First Amendment. Petitioner's Brief at 23-25. Petitioners distort this Court's precedent since *Pickering*, and attempt to create a sophistic distinction. No authority is offered why a working person cannot be what he or she is in reality – both a citizen and an employee.

Even prior to *Pickering*, this Court recognized that public employees are "citizens" first and consequently do not altogether relinquish their First Amendment rights of citizenship. The language from *Pickering* and *Connick* quoted by Respondents to posit a critical "citizen speech" component of First Amendment application in fact only reflected the historical distinction as well as the more recent acknowledgement that public employees *are* citizens:

> We hold only that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual

> circumstances, a federal court is not the appropriate forum in which to review the wisdom for a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick, 461 U.S. at 147.

The operative distinction in this language is whether the employee speaks on a matter of public concern, as opposed to a matter of only personal interest, and thereby becomes entitled to First Amendment protections within the framework of the *Pickering* balance. In *Waters*, this Court similarly emphasized the character of the speech, rather than the speaker:

> And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished.

Waters, 511 U.S. at 674.

This Court long has recognized the importance of free communications and duty speech for the government to function effectively in the context of litigation. In *N.L.R.B. v. Scrivener*, this Court explained that free speech rights for witnesses should be broadly construed so as "to prevent the Board's channels of information from being dried up by employer intimidation of prospective complainants and witnesses." 405 U.S. 117, 122 (1972).

Indeed, petitioners propose to reverse a consistent pattern of evolving precedents that protection is necessary for communications by a public official whose duties include the subject matter of the communication. *Bridges v. California*, 314 U.S. 252, 277-78 (1941).

Similarly, lower courts long have respected the necessity for open communications within government channels. In *Burkett v. United States*, 402 F.2d 1002, 1008 (Ct. Cl. 1968), the Court of Claims noted "the importance of keeping open channels through which employees can call attention to alleged derelictions or injustices to the attention of their superiors." In *Hostrop v. Board of Jr. College School District No. 515*, 471 F.2d 488, 493 (7th Cir. 1972), the court noted that "[p]laintiff, as a public employee, was entitled to be protected from retaliation for actions which he had every reason to believe were a part of his assigned duties."

In *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979), this Court's unanimous ruling ended any confusion whether the First Amendment applies to a government employee's internal speech. This Court's same reasoning applies to duty speech at issue in this case:

> The First Amendment forbids abridgement of the freedom of the speech. Neither the Amendment itself not our decision indicate that this freedom is to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to accept such a view of the First Amendment.

Givhan, 439 U.S. 415-16. As this Court emphasized in *City of Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission*, 429 U.S. 167, 176 n.10 (1976), "It would strain First Amendment concepts extraordinarily to hold that dissident teachers could not communicate [their] views to the very decisionmaking body charged by law with making the choices raised. . . ."

III. STATE AND FEDERAL STATUTES ARE AN INHERENTLY INADEQUATE SUBSTITUTE FOR CONSTITUTIONAL PROTECTION.

Petitioners and *amici* contend that statutory protections render constitutional rights unnecessary. Whistleblowers who have had to rely on those statutes would strenuously disagree. While 46 states and the District of Columbia have some form of statutory protection for public employees, "the effectiveness of whistleblower protection varies radically from jurisdiction to jurisdiction." Kohn, *supra*, at 378. As one commentator explained, "State whistleblowing statutes consist of a patchwork of provisions. While some provide fairly broad protection, others limit protection to a specific industry area. The state whistleblowing statutes also differ in the type of disclosure they protect, the manner of disclosure they require, and the remedies they provide." Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 Wash. L. Rev. 1029, 1047 (2004).

To illustrate the inconsistencies, in Mississippi public employees are protected, but only if they provide information to an investigative body or agency. Miss. Code Ann. § 43-47-37 (1999 & Supp. 2003). In Texas public employees are protected if they report a violation of law. Texas Gov't Code Ann. § 554.001-.010 (Vernon 1994 and Supp. 2004). In Utah and West Virginia they have free speech rights for reporting a violation of law or waste. Utah Protection of Public Employees Act, Utah Code Ann. § 67-21-1 to -9 (2000); W. Va. Code Ann. § 6C-1-1 to -8. (Michie 2003). In Wisconsin and Wyoming, free speech rights protect government workers for reporting illegality, mismanagement, abuse of authority, substantial waste or a danger to public

health and safety. Wis. Stat. Ann. § 895.65 (West 1997 and Supp. 2003); Wyo. Stat. 9-11-103 (Michie 2003). Quite clearly, a bewildering array of hit or miss statutes is no substitute for constitutional protection as a floor for this right.

The Whistleblower Protection Act's track record is a potent lesson learned of the fragility of statutory free speech rights. The law repeatedly had an overwhelming legislative mandate. As a leading commentator noted about the original 1978 passage of free speech rights, "The ideological breadth of the coalition supporting whistleblower protection indicates that the passage of these provisions is a strong congressional statement in support of the legitimacy of whistleblowing." Robert G. Vaughn, *Statutory Protection of Whistleblowers in the Executive Branch*, 1982 U. Ill. L. Rev. 615, 619-20.

If anything, this mandate was intensified by passage of the Whistleblower Protection Act in 1989. While Congress seldom passes any significant legislation unanimously, due to a pocket veto this law was approved twice in just over five months, along with an earlier unanimous approval in the Senate. 134 Cong. Rec. S10632 (daily ed., Aug. 2, 1988); *id.* at H9323; *id.* at S.15337; 135 Cong. Rec. S10632 (daily ed., March 16, 1989); and *id.* at S2805. After Congress unanimously strengthened the Act in 1994, commentators hailed it as the strongest free speech law in history, on paper. *See, e.g.*, Thomas M. Devine, *The Whistleblower Protection Act and the Modern Law of Dissent*, 51 Admin. L. Rev. 531 (Spring 1999).

Unfortunately, the record of the Act has been one of sustained frustration for those who rely on it. S. Rep. 107-349, 107th Cong., 2d Sess. November 19, 2002. The bottom

line is that the aggrieved employee almost always loses. In appellate decisions at the Federal Circuit Court of Appeals from October 1994 until September 1, 2003, whistleblowers had a 1-84 track record for decisions on the merits. Testimony of Thomas M. Devine, *Hearings on S. 1358 before the Senate Governmental Affairs Committee* (Nov. 12, 2003), slip testimony at 25. Although in theory the statute protects "any" lawful disclosure the employee reasonably believes is evidence of listed misconduct, in reality it no longer covers disclosures to co-workers, suspected wrongdoers, supervisors who lack authority to impose corrective action; *Horton v. Department of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), or any speech except by the first person to disclose the information. *Meuwissen v. Department of Interior*, 234 F.3d 9 (Fed. Cir. 2000). Most relevant for the case at bar, the law no longer covers speech that is part of carrying out assigned duties, except if the results are taken outside channels. *Willis v. Department of Agriculture*, 141 F.3d 1139, 1143 (Fed. Cir. 1998); *Huffman v. OPM*, 263 F.3d 1341 (Fed. Cir. 2001). There can be little serious disagreement that even the best-intentioned statutes are too unstable to serve as reliable substitutes for a minimum base of constitutional rights.

IV. PETITIONER'S WARNINGS OF PARALYZED MANAGEMENT AND FLOODED COURTS HAS FAILED THE REALITY TEST.

A. Careful application of "Public Concern" Jurisprudence and *Pickering* Balance Will Check Frivolous First Amendment Claims.

Petitioner's argument for reining in "drifting First Amendment jurisprudence" is largely based upon the twin predictions of management paralysis and litigation deluge.

These are, of course, the same exhortations urged to oppose coverage of Mr. Pickering's speech 38 years ago. First Amendment coverage of government employee speech since *Pickering* has not handicapped management nor dramatically increased the volume of First Amendment litigation. Nor will coverage of job-required speech by government employees inaugurate these harms.

Furthermore, as most recently noted in *U.S. v. National Treasury Employees' Union*:

> When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.

NTEU, 513 U.S. at 475, citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 664 (1994).

Wholesale denial of First Amendment protection to job-required speech is an immoderate response to the posited harms. Nevertheless, the reluctance to expand First Amendment protections to expression in the course of job duties stems from a legitimate concern that management may become unduly burdened if it is too easy to claim protected status. But frivolous free speech claims may be deterred and screened out by careful application of the discerning First Amendment jurisprudence beginning with *Pickering*. Potential mischief with an expanded scope of protection may be countered by prudent application of the *Connick* "content, form and context" test for "public concern," the nexus requirement and the time-tested

Pickering balance. *Connick*, 461 U.S. at 147-148; *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274 (1977); *Pickering*, 391 U.S. at 568.

B. Decades of Environmental Whistleblower Jurisprudence Protecting Disclosures Pursuant to Job Duties Have Not Resulted in Flood of Litigation.

For at least two decades, private employees have been protected for job-required disclosures under a number of environmental whistleblower statutes. *See, e.g.*, 15 U.S.C. § 2622 (Toxic Substances Control Act) (2005); 33 U.S.C. § 1367 (Federal Water Pollution Control Act) (2005); 42 U.S.C. § 300-j-9 (Safe Drinking Water Act) (2005); 42 U.S.C. § 5851 (Energy Reorganization Act) (2005); 42 U.S.C. § 6971 (Solid Waste Disposal Act) (2005); 42 U.S.C. § 7622 (Clean Air Act) (2005); and 42 U.S.C. § 9610 (Superfund) (2005). These statutory protections have resulted in neither managerial paralysis nor a flood of litigation. Petitioners' predictions regarding the dire consequences of extended coverage have been tested in the real world and those tests have not borne out the harm foretold.

Generally speaking, these whistleblower provisions protect any employee, private or public, who assists in enforcement of the substantive provisions of the underlying Acts.

There has been an opportunity to test Petitioners' predictions under these corporate speech statutes. In 1984, the Ninth Circuit held that internal complaints pursuant to job duties triggered protection under the ERA. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159 (9th Cir. 1984). Mackowiak, a quality control inspector at a nuclear power plant under construction, was

employed by University Nuclear Systems Incorporated (UNSI), a subcontractor of Bechtel, itself a contractor with the Washington Public Power Supply System. The duties of quality control inspectors of nuclear power plants are governed by the regulations of the Nuclear Regulatory Commission. Mackowiak inspected work performed by UNSI employees to confirm conformance with federal specifications. If an inspector found an item of possible noncompliance, he was required to write a "Request for Information" to the quality assurance department. If an inspector found improper installation or construction, he was required to "red tag" the item in question and file a Non-Conformance Report. *Id.* at 1160-61.

As part of his inspector duties, Mackowiak repeatedly made a record of UNSI safety and quality violations. For example, over the course of a month and a half, he filed a Request for Information regarding possible falsification of documentation by UNSI personnel; he filed a Request for Information regarding access to the tool cribs; and he "red tagged" a tool crib. Shortly thereafter, Mackowiak was laid off. *Id.* The Ninth Circuit found that Mackowiak's internal complaints about safety and quality, undertaken as part of his quality control inspector duties, were protected under the ERA's whistleblower provisions. *Id.* at 1163. The Court explained that they were modeled on and served the same purpose as the similar provisions of the Mine Health and Safety Act. Noting that internal safety complaints were covered under the MHSA, the Court reasoned that the rationale for coverage was even stronger in Mackowiak's case because quality control inspectors play such a crucial role in NRC oversight of nuclear plants:

> At times, the inspector may come into conflict with his employee by identifying problems that

> might cause added expense and delay. If the NRC's regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems.

Id. at 1163.

Arguing against such protection, UNSI raised the specter of a collapse of managerial authority. The Ninth Circuit responded decisively:

> UNSI argues that the Secretary's ruling [finding internal, job-required disclosures covered under the statute] would require companies to retain "abrasive, insolent, and arrogant" quality control inspectors if they comply technically with the requirements of the job. Not so. The ruling simply forbids discrimination based on competent and aggressive inspection work. In other words, contractors regulated by §5851 *may not discharge quality control inspectors because they do their jobs too well.*

Id. (emphasis added).

A year later, the Tenth Circuit approved the reasoning in *Mackowiak* and found that a quality assurance inspector who filed reports with his superiors detailing potential quality assurance problems was covered under the ERA's whistleblower provisions. *Kansas Gas & Electric Company v. Brock*, 780 F.2d 1505, 1513 (10th Cir. 1985). Recognizing the Fifth Circuit had reached a different result in *Brown and Root v. Donovan*, 747 F.2d 1029 (5th Cir. 1984), the Court discounted the decision because it failed to adequately address the remedial purposes of whistleblower statutes and the consequent necessity for a broad construction. *Kansas Gas & Electric Company*, 780 F.2d at 1513.

Whistleblower protection for private employees who raise concerns pursuant to their job duties is well-established under the environmental and nuclear whistleblower statutes administered by the Department of Labor. *See, e.g., Bassett v. Niagara Mohawk Power Co.*, 86-ERA-2 (Sec'y July 9, 1986) (the performance of quality assurance work for an employer covered by the Acts is *per se* protected activity); *Richter v. Baldwin Associates*, 84-ERA-9 to 12 (Sec'y Mar. 12, 1986); *Tyndall v. U.S. EPA*, 93-CAA-6 (ARB June 14, 1996) (job duties performed by investigator for the Inspector General of the U.S. EPA found to constitute protected activity); *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002), slip at 5 (raising safety and health issues at the LANL as part of his job as an internal assessor is covered activity); *Higgins v. Alyeska Pipeline Service Co.*, 97-CAA-13 (ALJ Order Denying Motion for Summary Decision, January 26, 1998) (performance of job duties involving investigating employee complaints about operation of pipeline found "inherently protected activity"). Protection of job-required speech under these statutes has resulted in no discernable impediment to managerial authority in the relevant private industries. Nor will coverage of job-required speech under the First Amendment.

CONCLUSION

A per se restriction of job-required speech, as proposed by Petitioners, will chill ethical conduct by governmental employees and wreak incalculable damage on the nation. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

JOANNE ROYCE
THOMAS M. DEVINE
GOVERNMENT ACCOUNTABILITY PROJECT
1612 K Street, NW,
Suite 1100
Washington, D.C. 20006
(202) 408-0034

MARISSA M. TIRONA
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
44 Montgomery Street,
Suite 2080
San Francisco, CA 94104
(415) 296-7629 ext. 103

JEFFREY L. NEEDLE
ASSOCIATION OF TRIAL LAWYERS OF AMERICA
LAW OFFICES OF JEFFREY NEEDLE
119 1st Ave. South
Suite #200
Seattle, Washington 98104
(206) 447-1560